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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

KELU MAUNDU,

Plaintiff and Appellant,

v.

eBAY, INC.,

Defendant and Respondent.

H026619
(Santa Clara County
Super.Ct.No. CV 805894)

For nine months in 2001, appellant Kelu Maundu (Maundu) worked for respondent eBay Inc. (eBay) as an independent contractor. She worked in eBay's Quality Assurance (QA) department as a software tester (called a "blackbox" engineer). Maundu later brought suit against eBay, alleging racial discrimination under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) (FEHA). Maundu claims that eBay discriminated against her in its decision not to hire her after she applied for employment as a blackbox engineer. The case is before us as a result of a judgment entered after the trial court granted eBay's motion for summary judgment.

For the reasons stated below, we conclude—from our de novo review of the motion—that eBay negated one or more of the four required elements of a prima facie case of discrimination, as enunciated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*). Accordingly, we affirm the judgment.

FACTS

I. *Overview*

There were parallel events in different departments of eBay that are relevant to this case. The chronology of these events in 2001[1] is important in considering Maundu's discrimination claim:

March:	Maundu starts at eBay as contractor, performing blackbox engineer functions in QA department;
May 17:	A job requisition form for blackbox engineer position is signed;
June 12:	eBay vice president decides to defer hiring blackbox engineer until at least August;
June 18:	Maundu submits job application for blackbox engineer position;
June 25:	Request for Offer Letter form is partially signed, identifying Maundu as candidate for blackbox engineer position;
Aug. 22:	New QA Director decides (1) to hire a software developer ("whitebox" engineer), and (2) to terminate contracts of Maundu and another blackbox contractor;
Aug. 30:	A job requisition for whitebox engineer is prepared;
Oct. 15:	New whitebox engineer starts work in QA department;
Oct. 31:	Maundu files charge of discrimination against eBay with the United States Equal Employment Opportunity Commission (EEOC);
Nov. 14:	Maundu advises her employer and eBay that she will be taking six-week vacation, from December 1 to January 15, 2002; and
Nov. 30:	Maundu works her last day as contractor at eBay.

[1] All dates are 2001 unless otherwise indicated.

II. *eBay's QA Department*

eBay operates an online marketplace that lists (on eBay's Internet site) more than 12 million items for sale on any given day. eBay has a QA department; within that department is the Automation group, where Maundu worked as an independent contractor. The Automation group is responsible for designing and running computer programs known as "scripts" that test various portions of the eBay site. The script simulates a human user accessing the site and is "automated" in the sense that the person running the computer program can test the Web site without typing in data or manually "clicking" buttons on the Web page.

In 2001, there were two basic aspects of eBay's Automation group. There were blackbox engineers, who were software testers who primarily ran (but generally did not design) the test programs (scripts). They (by Maundu's admission) did not need a background in computer programming. There were also whitebox engineers; they had more technical background and designed the scripts. They were software developers, who wrote the SilkTest code that was used by eBay's blackbox engineers.

At the time Maundu started working at eBay, there were a total of four people working in the QA department as blackbox engineers; two were contractors (Maundu and Jerry Ussery), and two were employees (Elina Greiff and Yoko Fukuda). In addition, there were four whitebox engineers.

At all relevant times in 2001, Peninah Mwaniki managed the Automation group.[2] Mwaniki's superior was Robin Hedges, QA Director, until Hedges was terminated on August 14, 2001.[3] Scott Murray succeeded Hedges as QA Director on August 20.

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[2] Mwaniki is Black and is from Kenya. She was an eBay employee from March 20, 2000, through February 1, 2002. Mwaniki apparently sued eBay as well, although the nature of that suit is not apparent from the record.

[3] The record is silent regarding the reason(s) for Hedges's termination.

III. *Maundu—A Contractor Working At eBay*

Maundu is Black and is from Kenya. She received a bachelor's degree in accounting in 1997. Maundu commenced working as an independent contractor in eBay's Automation group in March 2001. At all times during her affiliation with eBay, she was an employee of Intellitest, later known as Vettanna LLC (Vettanna).

During the entire time that she worked at eBay (from March through November), Maundu performed the duties of a blackbox engineer, i.e., testing eBay's Web site using SilkTest. She understood at the time that her assignment at eBay was for a period of six months.

IV. *Requisition (Blackbox Engineer) & Maundu's Application*

On May 17, Mwaniki signed a requisition for a blackbox engineering position in the QA department and submitted the form to Hedges, her superior. (Mwaniki had originally written the requisition for a whitebox engineer, but Hedges asked her to change it to provide for a blackbox engineer.) This requisition was a "backfill" (replacement) requisition for a blackbox engineer (employee), Greiff, who was transferring to another department. It was also signed by, among others, Lynn Reedy, Vice President of Product Development, on May 22. This requisition was assigned the number "01-001566."

On May 31, Mwaniki sent an e-mail to, among others, Mark Flaa with Vettanna, in which she indicated that "Kelu Maundu your contractor working for eBay automation will be converting into eBay regular employee soon." [*Sic*.] Flaa responded to this e-mail and forwarded it to others at Vettanna and to eBay employees, including Hedges. Hedges wrote to Mwaniki on May 31 concerning the latter's e-mail: "I have heard nothing about converting Kelu from you. I do not think this is a good idea considering her restriction on working hours due to school. Additionally, considering the organizational changes I am making, [Greiff's] replacement will work for Steve Brunetto

taking direction from Yoko [Fukuda], so so [*sic*] Steve and Yoko should handle the recruiting and interviewing."[4]

In early June, Maundu approached Mwaniki about the possibility of converting her position from contractor to employee. Mwaniki told Maundu that she could "put out an application, and then she will see." Maundu submitted an application for employment as a blackbox engineer on June 18.

V. *Request For Offer Letter*

On June 25, Mwaniki received from eBay's human resources (HR) department an internal document entitled, "Request for Offer Letter" (Offer Request). Mwaniki signed it on the same day. The form identified Maundu as a candidate for a position as an associate QA engineer (grade level E3), and with a proposed salary offer of $54,000.

The Offer Request form contained blanks for approval by five separate eBay representatives. eBay procedure required that this form be signed, at minimum, by all five eBay representatives in order to extend an offer to an applicant. The Offer Request in this instance was never signed either by the "Department V.P." or by "Finance."[5] Additionally, there was no evidence that eBay ever generated an offer letter to Maundu.

During a managers' meeting sometime after June 25 (Mwaniki testified), Hedges told Mwaniki that "[y]ou should have given [the Offer Request] to me so that I can follow through with it." In late June or early July, Reedy gave Hedges the Offer Request (that Mwaniki had given to Reedy previously). At that time, Reedy told Hedges that she

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[4] Hedges testified that she advised Mwaniki to have another manager interview Maundu before extending any offer "[t]o ensure fairness." Mwaniki admitted that she did not have Brunetto interview Maundu, and there is no evidence that anyone other than Mwaniki ever interviewed Maundu.

[5] Maundu's charge of discrimination filed with the EEOC alleged (incorrectly): that she was denied employment by eBay, despite the fact that her "application was accepted, approved by all of upper management (Vice President, Product Development, Human Resources Hiring Manager, and Finance)."

was giving her the Offer Request because Mwaniki had not secured Hedges's signature on the form, and that, in any event, eBay was not even hiring for the position, since Reedy had "pushed out" the requisition until later in the year.

VI. *Decision Re Hiring Priorities*

In 2001, Reedy managed several departments, including the QA department. She was responsible for working with eBay's finance department to prioritize expenditures, including hiring expenditures. In late May, eBay's Executive Staff instructed the finance department to work with eBay managers to defer hiring against open requisitions, due to budgetary constraints. Tracy Baeckler, finance manager in the finance department, worked with Reedy to plan new hiring targets in Reedy's organization. Neither Hedges nor Mwaniki was involved in these discussions between Reedy and Baeckler.

As part of this project of prioritizing hiring expenditures, on or before June 12, Reedy decided to defer hiring against the open requisition to "backfill" the vacancy created for a blackbox engineer as a result of Greiff's transfer. This was six days *before* Maundu submitted her application for employment. Because Reedy felt that the need to "backfill" this position was not as great as other staffing needs, she decided to defer hiring against the vacancy created by Greiff's transfer until August, if it was to be filled at all. At the time Reedy made this decision, neither she nor Baeckler knew that Maundu (or anyone else) was interested in the blackbox position.

The hiring priorities were memorialized in two e-mails between Baeckler and Reedy dated June 12 and June 13. In Baeckler's June 12 e-mail, she wrote: "Please review the attached spreadsheet. It has all of your open reqs divided into the categories that we discussed last week . . . . The 'A' category consists of 10 reqs to be spaced as follows: 1 in June, 3 in July, 3 in August, 3 in September. . . . Also, since we will be showing numbers higher than our issued target, the headcount is still subject to approval by Brian. . . . If we do not get additional funding, we may need to make further

adjustments. . . . [¶] Let me know how you would like us to distribute the 1, 3, 3, 3. I am holding two offers currently, Bernard's opening as well as Raji's."

Baeckler prepared a spreadsheet (attached to her June 12 e-mail) entitled, "PD Headcoun [*sic*] Target as of 6/12/01." The spreadsheet reflected Reedy's decisions regarding prioritizing the hiring against open requisitions. It listed various open requisitions and the respective dates of deferral of hiring against the requisitions; the requisition relative to the Greiff transfer was listed as a category "A" under the column "Aug-01."

Reedy responded to Baeckler's June 12 e-mail (with spreadsheet attached) on June 13 as follows: "I want to approve the offers immediately. [A]s for the others the priority has been assigned." Reedy testified that the spreadsheet reflected that the "earliest date that I could hire . . . would be August."

VII. *Alleged Statements Concerning Ethnicity*

Between May 17 and May 30, Hedges and Steve Brunetto had a meeting with Mwaniki, wherein Hedges mentioned complaints from employees whom Mwaniki supervised. In this meeting, in response to Mwaniki's statement that she wanted to hire Maundu as an employee to replace Greiff (blackbox engineer), Hedges turned to Brunetto, stating: " 'Oh, it's another black face.' "[6] Hedges then turned to Mwaniki and said, " 'I'm sorry. I didn't mean to say that.' "[7]

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[6] There was evidence from Mwaniki that the statement by Hedges was, " 'Oh, it's another black face,' " or, alternatively, " 'is another Black.' "

[7] Hedges denied that she made the statement attributed to her by Mwaniki. There was no evidence either corroborating or refuting this statement from the third participant, Brunetto. For purposes of evaluating the merits of eBay's motion for summary judgment, however, we assume that Hedges made the statement. (See *Kulesa v. Castleberry* (1996) 47 Cal.App.4th 103, 112 [summary judgment "papers are to be construed strictly against the moving party and liberally in favor of the opposing party"].)

In the early evening of a day in July, Maundu overheard a conversation involving Hedges, Brunetto, and an unidentified female. In this conversation, Hedges stated, " 'I think they don't like, you know, to have another black person, so we can't hire another black person.' "

VIII. *Maundu Inquiries About Application*

On July 27, Maundu sent an e-mail to Mwaniki, inquiring about the status of her job application. There was no evidence that Maundu received a response to this e-mail.[8]

On September 14, Maundu again e-mailed Mwaniki to inquire about the status of her application. Mwaniki told Maundu that she would investigate the matter. In late September or early October, Maundu learned that she was not going to be hired by eBay. No one ever told Maundu that she was not going to be hired either because there was a delay due to budgeting or because the position was no longer open.

There were no applicants for blackbox engineer—by Maundu's own admission, through February 1, 2002—after Maundu submitted her application on June 18. Further, it was undisputed that eBay did not hire any blackbox engineers for the Automation group for a period of at least *18 months* after Maundu ceased working for eBay as a contractor.

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[8] Maundu's inquiry resulted in a series of e-mails exchanged on July 27 between Mwaniki and Diana Anderl, a contractor who did recruiting in the HR department. In one of the e-mails, Mwaniki wrote that there had been a previous reference that Maundu " 'is another Black,' [which] was discussed and was dismissed and [Hedges] told me to go ahead with the hire," but to have Brunetto interview Maundu. Anderl's two e-mails were to the effect that Hedges "did not support" the hiring of Maundu. eBay objected to Anderl's statements on the basis that they were hearsay and speculation. The statements concerning Hedges allegedly not being in favor of the hire were hearsay, offered for the truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) Maundu contends that the statements were subject to various exceptions to the hearsay rule; we have reviewed these arguments and find them unpersuasive. eBay's evidentiary objections should be sustained. This evidentiary ruling notwithstanding, we note that, even were we to conclude that the Anderl e-mails were admissible, our consideration of such evidence would not affect our ultimate decision that the judgment should be affirmed.

IX. *Decision To Hire Whitebox Engineer*

Murray met Hedges once during the interview process and did not see or speak with her after he was hired. They never discussed Maundu. Shortly after he became QA Director on August 20, Murray decided that he wanted to phase out the blackbox engineer position from the Automation group. He was never told that there had been an open requisition for a blackbox engineer. Murray was also concerned that two blackbox engineers, Maundu and Ussery, had been working as contractors at eBay for several months.

He met with Mwaniki in late August to discuss hiring needs in the Automation group. They discussed the hiring of a whitebox engineer; due to Murray's goal of reducing the number of blackbox engineers in the group, he was not interested at the time in hiring a blackbox engineer as a regular employee.[9] Mwaniki told Murray that she had been trying to hire Maundu, and that she still wanted to hire her; Murray told Mwaniki that he wanted to hire someone with higher qualifications.[10]

On August 22, Murray sent an e-mail to Mwaniki in which he indicated that he wanted to commence the process of terminating the Ussery and Maundu contracts. In the same e-mail, Murray advised Mwaniki: "I would also like us to proceed on hiring a senior type developer/QA person for the open position that Elena Greiff you [*sic*] to have." On the same day, Mwaniki contacted Segue to inquire about candidates for the

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[9] Mwaniki indicated in her declaration that she disagreed with Murray's decision, but followed the instructions of her superior. There is no indication in the record, however, that Mwaniki *actually expressed* that disagreement to Murray.

[10] This evidence was based upon Mwaniki's declaration (submitted in opposition to the summary judgment motion). There was some discrepancy between this evidence and Mwaniki's prior deposition, wherein she testified that she did not remember having a discussion with Murray prior to August 22 about hiring a senior-type person. In addition, we note that Mwaniki, in her declaration, did *not* state that she told Murray about Hedges's statement in May that Maundu was "another black face."

whitebox engineer position. She did so because Murray wanted someone with strong background in SilkTest, and Segue was the company that had developed SilkTest.

Mwaniki worked with Anderl to hire a whitebox engineer. Mwaniki and Anderl used the same requisition number (01-001566) that had been opened previously in May to "backfill" the Greiff vacancy. Because the job description had changed, Anderl informed Mwaniki that she would need to change the job description to reflect the qualifications of a whitebox engineer.[11] Accordingly, Mwaniki prepared an employment requisition on August 30 that reflected, inter alia: (a) a position title of "[w]hitebox automation"; (b) a grade level ("T8") and a salary level that were higher than those levels for the prior blackbox opening; (c) job duties that included "developing SilkTest with 4Test code"; and (d) qualifications of a "BS in computer [s]cience and 4-6 years of experience," an "MS and 2-4 years of work experience," or "a technical degree with QA automation experience."

Neither Murray nor Mwaniki ever signed this requisition for a whitebox engineer. Murray does not know why he never signed the form. Reedy testified that it was company policy to have signatures on a requisition and to have it "on file" in order to move forward with filling the position.

There were two applicants for the whitebox engineer position, Scott Burrese and Raja Bhamidipati. Both had extensive computer programming experience. Bhamidipati's background and experience included technical education (two degrees in metallurgical engineering), and four years of computer programming (including work for Segue). Bhamidipati was hired for the whitebox position, with his employment commencing on October 15.

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[11] There was evidence presented below that an eBay hiring requisition represented a "headcount," that it was often revised or transferred by different managers, and that it was, therefore, not unusual for a requisition to have the job description and/or job title changed after its initial approval.

Maundu did not submit an application for the whitebox position. She admitted that she did not have the qualifications to fill a whitebox position in eBay's QA department, since her "background was not programming."[12] At no time did Mwaniki tell Murray or Anderl that Maundu should be considered for the whitebox position.

X. *Termination Of eBay/Maundu Relationship*

On November 14, Maundu sent an e-mail to her employer, Vettanna, and to Mwaniki, indicating that she would be taking a vacation of six weeks commencing in December. This was longer than any vacation taken by an employee or contractor in the QA department. Maundu did not formally advise anyone at eBay of these vacation plans prior to November 14. Due to the length of the vacation and the existence of an eBay/Accenture joint project to increase and improve automation (with a December 31 deadline), the QA department (according to Murray) "could ill afford to lose a full-time resource for almost six weeks."

Murray worked with Mwaniki to find a replacement for Maundu. After not being able to obtain a replacement through Vettanna, eBay (through Mwaniki) retained a contractor through another firm. eBay also replaced Ussery in December with another contractor. The contractors who replaced Maundu and Ussery were a Vietnamese man and a man who was Black and originally from Kenya.

PROCEDURAL HISTORY

On October 31, Maundu filed a charge of discrimination with the EEOC. Maundu filed the complaint in this action on March 8, 2002, alleging one cause of action for employment discrimination under Government Code section 12940, subdivision (a) et

[12] Maundu testified that, shortly before she started work at eBay, she went on-line to the Segue Web site to "[f]ind out what SilkTest [was]."

seq. The complaint alleged that eBay "refused to hire and promote [Maundu] on the basis of her race (i.e., African)."[13]

Maundu alleged in her complaint that she commenced working for eBay "as a contract employee through Intellitest LLC (later known as Ventatta [*sic*])" in or about March. She alleged that, in June, a full-time position became available in the department where Maundu had been working, and that the position required job functions that she had been previously performing at eBay. Maundu alleged that she applied for the position on June 18, and that she was qualified for the job. She alleged that eBay, at Murray's instructions, ultimately hired Bhamidipati for the position for which Maundu had previously been approved and for which she "was more experienced and qualified."

eBay filed a motion for summary judgment (motion), which was opposed by Maundu. eBay claimed that Maundu could not establish either the second or fourth element of a discrimination claim under *McDonnell Douglas*, *supra*, 411 U.S. 792, namely, that there was no evidence (a) that she applied for a job *for which eBay was seeking applicants*, and (b) that, after her rejection, *the position remained open and eBay continued to seek applications from persons of her qualifications*. In addition, eBay asserted in the motion that Maundu could not rebut eBay's nondiscriminatory reasons for not hiring her.

The trial court granted eBay's motion in a lengthy order on September 9, 2003, concluding, inter alia, that Maundu (1) did not present a prima facie case of discrimination, and (2) did not rebut eBay's showing that it had legitimate nondiscriminatory reasons for not hiring her. The court entered judgment on the

[13] eBay claims that Maundu's complaint alleged discrimination on the grounds of race *and* national origin. It is clear, however, that Maundu alleged discrimination only on the basis of race in both her complaint and in the charge of discrimination filed with the EEOC.

summary judgment order on October 6, 2003. Maundu filed timely her notice of appeal on October 27, 2003.

DISCUSSION

I. *Standard Of Review In Employment Discrimination Case*

A. *Summary judgment, generally*

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) A summary judgment motion must demonstrate that "material facts" are undisputed. (Code Civ. Proc., § 437c, subd. (b).) The pleadings determine the issues to be addressed by a summary judgment motion (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, revd. on other grounds *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490), and the declarations filed in connection with such motion "must be directed to the issues raised by the pleadings." (*Keniston v. American Nat. Ins. Co.* (1973) 31 Cal.App.3d 803, 812.)

The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) A defendant moving for summary judgment must " 'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Id.* at pp. 853-854, quoting Code Civ. Proc., § 437c, subd. (*o*)(2).) A defendant meets its burden by presenting affirmative evidence that negates an essential element of plaintiff's claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) Alternatively, a defendant meets its burden by submitting evidence "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" supporting an essential element of its claim. (*Aguilar, supra*, 25 Cal.4th at p. 855.)

Since summary judgment motions involve purely questions of law, we review the granting of summary judgment de novo. (*Chavez v. Carpenter* (2001) 91 Cal.App.4th

1433, 1438.) In performing such independent review, we conduct the same procedure employed by the trial court. We examine: (1) the pleadings to determine the elements of the claim for which the party seeks the relief; (2) the summary judgment motion to determine if movant has established facts justifying judgment in its favor; and (3) the opposition to the motion—assuming movant has met its initial burden—to "decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Ibid.*; see also *Burroughs v. Precision Airmotive Corp.* (2000) 78 Cal.App.4th 681, 688.) We need not defer to the trial court and are not bound by the reasons for the summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450.)

B. *Racial discrimination under FEHA*

Under FEHA, it is unlawful "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person . . . ." (Gov. Code, § 12940, subd. (a).) A FEHA claim of discrimination is subject to the following three-part test for federal discrimination claims[14] enunciated in *McDonnell Douglas*, *supra*, 411 U.S. 792: "(1) [t]he complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for his actions; (3) the complainant must prove that this reason was a pretext to mask an illegal motive." (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1317.)

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[14] "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes. [Citation.] In particular, California has adopted the three-stage burden-shifting [*McDonnell Douglas*] test established by the United States Supreme Court for trying claims of discrimination." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 354; see also (*Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 851 [California looks to federal decisions because "antidiscrimination objectives and public policy purposes of the two laws are the same"].)

The complainant demonstrates a prima facie case of discrimination by showing the following: "(i) [T]hat he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (*McDonnell Douglas*, *supra*, 411 U.S. at p. 802, fn. omitted.) The presentation of such a prima facie case of discrimination " 'in effect creates a presumption that the employer unlawfully discriminated against the employee.' [Citation.]" (*St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 506 (*St. Mary's*), quoting *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254 (*Burdine*).) This presumption requires the employer to rebut the prima facie case by producing some evidence that there was a " 'legitimate, nondiscriminatory reason' " for the employer taking the adverse employment action. (*St. Mary's*, *supra*, 509 U.S. at p. 507, quoting *Burdine*, *supra*, 450 U.S. at p. 254.) " 'If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,' [citation], and 'drops from the case,' [citation]." (*St. Mary's*, *supra*, 509 U.S. at p. 507.) The "plaintiff at all times bears the 'ultimate burden of persuasion.' [Citations.]" (*Id.* at p. 511; see also *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 142-143.) In essence, to establish a FEHA discrimination claim based upon disparate treatment, "a complainant must show that a causal connection exists between his protected status and the adverse employment decision." (*Ibarbia v. Regents of University of California* (1987) 191 Cal.App.3d 1318, 1328.)

This "burden of proving a prima facie case of disparate treatment is not onerous." (*Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1751.) Moreover, the four-part *McDonell Douglas* formula for a prima facie case "is not intended to be an inflexible rule. 'The facts necessarily will vary in [t]itle VII cases, and the specification above of the prima facie proof . . . is not necessarily applicable in every

respect to differing factual situations.' [Citation.]" (*Ibarbia v. Regents of University of California*, *supra*, 191 Cal.App.3d at p. 1327, quoting *McDonnell Douglas*, *supra*, 411 U.S. at p. 802, fn. 13.)

C. *Summary judgment—FEHA employment discrimination cases*

In the context of an employer's motion for summary judgment in connection with an employment discrimination claim, " 'the burden is reversed. . . .' [Citation.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1731 (*Martin*), quoting *University of Southern California v. Superior Court* (1990) 222 Cal.App.3d 1028, 1036.) Where the employer "presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to defendant's showing." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203; see also *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 (*Cucuzza*).)

If the employer meets this burden in its summary judgment motion, "the employee must demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action. [Citations.]" (*Cucuzza*, *supra*, 104 Cal.App.4th at p. 1038.) If the employer has provided in its motion a nondiscriminatory reason for the adverse action, the employee's rebuttal obligation is not satisfied where "the employee simply show[s] the employer's decision was wrong, mistaken, or unwise." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.) The employee's "speculation cannot be regarded as substantial evidence. [Citation.]" (*Martin*, *supra*, 29 Cal.App.4th at p. 1735.)

II. *Issues Raised On Appeal*

eBay asserted below that Maundu, as a matter of law, could not prevail on her discrimination claim on several grounds. In essence, eBay contended that Maundu could not prove the second and fourth components of a complainant's prima facie case under *McDonnell Douglas*, *supra*, 411 U.S. 792, and that she could not rebut eBay's evidence that any adverse action was taken for nondiscriminatory reasons. eBay urged that summary judgment was appropriate because Maundu could *not* establish three essential matters: (1) at the time she submitted her application, eBay was, in fact, seeking applicants for a blackbox engineer position; (2) after she was rejected, eBay continued to seek applications for the position from persons with Maundu's qualifications; and (3) eBay's nondiscriminatory reason for not hiring Maundu was, in fact, pretextual.[15]

Maundu contends that the trial court erred in granting eBay's motion for summary judgment. The essence of Maundu's argument is that the trial court impermissibly drew conclusions based upon disputed issues of fact in two respects. First, the trial court concluded that there was no blackbox position available at the time Maundu submitted her employment application on June 18. The court (Maundu urges) erroneously concluded that eBay had decided no later than June 12, that it would *cease* any hiring for a blackbox position; to the contrary, the evidence indicated that the timetable for such hiring was merely *deferred* to August. Second, the trial court concluded that Maundu was not qualified for the position later filled; this conclusion (Maundu claims), based

[15] eBay also argued below that any claim that eBay had retaliated against Maundu for filing the EEOC charge of discrimination by terminating her contract was without merit. eBay urged that any such claim was barred for both procedural and substantive reasons. Maundu's opposition to the motion did not address this issue. Her counsel at the summary judgment hearing conceded that Maundu was not making a retaliation claim. Likewise, her appellate briefs do not contend that she alleged a retaliation claim that was improperly dismissed by the trial court. Accordingly, to the extent that her complaint may be construed as including a claim for retaliation, we deem Maundu to have waived any such claim.

upon conflicting evidence at the summary judgment stage, was error. We address these issues separately below.

III. *Maundu's Racial Discrimination Claim*

A. *No blackbox position available*

The second element of a prima facie discrimination case under *McDonnell Douglas*, *supra*, requires the plaintiff to show "that he applied and was qualified for a job for which the employer was seeking applicants." (*McDonnell Douglas*, *supra*, 411 U.S. at p. 802.) In essence, this prong has three components, namely, that the plaintiff applied for the job, that he or she met its qualifications, and that the position applied for was one for which the employer was seeking applicants. eBay does not dispute that Maundu applied for a blackbox position. It (grudgingly) concedes that she was qualified for this position. eBay contends, however, that Maundu cannot meet the third component, i.e., that eBay was seeking applicants for a blackbox engineer at the time Maundu applied for the position.

In essence, eBay correctly asserts that there can be no claim for "discrimination in the abstract." The United States Supreme Court has explained: "An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based. Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." (*Teamsters v. United States* (1977) 431 U.S. 324, 358, fn. 44.)

Maundu urges that summary judgment was improper, because it was based upon the court's erroneous finding that eBay "ceased" efforts to hire a blackbox engineer before she applied for the position on June 18. This was error, Maundu contends, because the evidence showed that, at most, the blackbox position was "deferred" or

"delayed" until August. Maundu also asserts that, in reaching its conclusion that there was no blackbox position available as of June 18, the court below ignored the evidence that Maundu was never told that the purported reason that she was not being hired was that there were budget concerns that postponed hiring against the blackbox requisition.

eBay responds that Maundu's argument that the blackbox position did not "cease," but was merely "deferred," is a game of semantics. It argues that, on June 12, hiring for the position *stopped*, and that it did not thereafter *start*.

We conclude—without commenting on the persuasive force of the evidence on this point—that there was sufficient evidence of the second *McDonnell Douglas* prong to preclude granting eBay's summary judgment motion. While a fact finder might determine that the blackbox position was never available after Maundu submitted her application on June 18, one cannot reach this unequivocal conclusion from the evidence presented in connection with eBay's motion.

There was certainly evidence from which the trier of fact *could* conclude that the proposed hiring of a blackbox engineer was suspended on June 12 and never resumed after that time. Baeckler declared that the blackbox position was deferred "until August 2001 at the earliest." Similarly, Reedy stated that she decided to defer hiring against the blackbox position "until at least August 2001, if it was to be filled at all."

Conversely, there was evidence from which a fact finder could conclude that the blackbox position, deferred in June, became available again in August. A reading of Baeckler's June 12 e-mail (with attachment) and Reedy's June 13 response could yield such a conclusion. The e-mails could be construed as not only assigning a priority for hiring, but as establishing that the blackbox position to "backfill" the vacancy created by Greiff's transfer would "open up" in August. One interpretation of the spreadsheet attached to Baeckler's June 12 e-mail—which identifies a ranking of "A" and a date of

"Aug 01" for the blackbox position—is that hiring for the position would commence again in August.[16]

In addition, Maundu was never told—in response to her several inquiries concerning the status of her employment application—that she would not be hired because of budgeting concerns or because the blackbox position was no longer open. Likewise, Mwaniki was not told that Maundu was not hired because the hiring for the blackbox position had been deferred. A trier of fact *could* infer from this evidence that, contrary to eBay's claim, the blackbox position had not been closed out as of June 12.

Thus, while the language in the Reedy and Baeckler declarations suggests that the blackbox engineer position was suspended until at least August and hiring was never resumed, the documentary and other evidence is less clear-cut. At most, we can conclude that the evidence showed: (a) hiring under the blackbox position was suspended on June 12; (b) Maundu applied for the blackbox position on June 18 (while hiring was "in suspension"); (c) hiring *may or may not* have resumed as early as August 1 (since the specific date in August is not identified in the Baeckler e-mail or spreadsheet); (d) Maundu's application was still pending as of August 1; and (e) hiring for a blackbox position (assuming it resumed in August) ceased on August 22, when Murray decided to hire a whitebox engineer.

Since the evidence was equivocal as to whether hiring against the blackbox position was suspended only from June 12 to August 1, Maundu's application *may have been* pending for at least some period of time in August while eBay was seeking applicants for the position. (See *Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 297 [party moving for summary judgment does not meet burden

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[16] Baeckler's June 12 e-mail stated that the projected hiring dates required the approval of others. There was no evidence that the hiring dates identified in the Baeckler e-mail and spreadsheet were *not* approved by upper management at eBay. Thus, a trier of fact *could* reject eBay's claim that the blackbox position was deferred until a date uncertain.

through "submission of evidence which is equivocal or from which conflicting inferences may be drawn"].) Therefore, eBay did not show that there was no evidence upon which Maundu could establish the second element of a prima facie case under *McDonnell Douglas*.

B. *No further applicants for blackbox position*

The fourth element of a prima facie case of discrimination requires the complainant to prove that "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (*McDonnell Douglas*, *supra*, 411 U.S. at p. 802, fn. omitted.) There are thus three components to this fourth prong: complainant was rejected; the position remained open after such rejection; and the employer continued to seek applicants after complainant's rejection. eBay contends that there is no triable issue of fact, and that it was entitled to summary judgment because of the absence of evidence on this necessary element of a discrimination claim. There was no evidence (eBay claims) that there were any applicants for the blackbox position or that such position remained open after Maundu's rejection. We agree.

As discussed *ante*, the evidence was equivocal as to whether hiring for the blackbox position—deferred on June 12—resumed on August 1. Therefore, we have concluded that a trier of fact *could* decide that Maundu's June 18 application was pending for some period of time after August 1, when the eBay blackbox position *may have*, again, been open. This determination, however, does not compel us to conclude that Maundu can establish the fourth *McDonnell Douglas* element of prima facie case of discrimination.

There was no dispute that, on or about August 22, Murray, as the new QA Director, decided to hire a whitebox engineer, rather than a blackbox engineer. Mwaniki, at Murray's direction, went forward with the process of seeking candidates for the

whitebox position. She did so, inter alia, by contacting Segue, and by revising the requisition (no. 01-001566) to provide for a whitebox job description and qualifications.

Thus, even if potential hiring for the blackbox position (deferred on June 12) resumed on August 1, we must conclude that the position closed without anyone being hired on or before August 22. The closing of this position—absent evidence of earlier rejection—operated as a de facto rejection of Maundu's application.

There was no evidence that there were *any* applicants for the blackbox position prior to August 22. Indeed, Maundu admitted that "e-Bay did not interview any applicants for the position of 'blackbox' engineer as described in requisition number 01-001566 on or after June of 2001 through the date of Ms. Mwaniki's termination [February 1, 2002]." Furthermore, the evidence was undisputed that eBay did not hire anyone as a blackbox employee in the Automation group *at any time* from June 18 (the date Maundu submitted her application) through at least June 5, 2003.

Even were we to find that Murray's decision on August 22 to hire a whitebox engineer did not constitute a rejection of Maundu's application, such rejection occurred no later than early October; by Maundu's own admission, she "learned some time [*sic*] in late September or early October that [she] was not going to be hired." Again, there was no evidence that there were any applicants for a blackbox engineer position at any time from early October to at least February 2002.

As noted, eBay received no applications for a blackbox position after Maundu submitted her application. The only applicants—Bhamidipati and Burrese—were for the whitebox position solicited at Murray's direction in late August. Both of these applicants had significant experience in computer programming that was required for the whitebox position. This was experience that Maundu admittedly lacked.[17]

[17] Maundu admitted that she did not have the qualifications required of a whitebox engineer because her "background was not programming." To the extent, therefore, that Maundu *might contend* that she "applied for" (through her June 18 application) the

Maundu argues that the evidence was equivocal concerning the creation of a whitebox position because the requisition for a whitebox engineer was not signed, notwithstanding the statement in the document that "[a]ll approval signatures must be obtained before recruiting is initiated." While the significance that Maundu attaches to this point is unclear, we conclude that this fact is immaterial to the disposition of eBay's motion. There was no dispute that there *were* two applicants in September with the whitebox qualifications identified in the revised requisition. It was likewise undisputed that, pursuant to the revised requisition, eBay hired an engineer (Bhamidipati) who had these whitebox qualifications. The fact that the revised requisition calling for employment of a whitebox engineer was unsigned is of no significance to the question of whether there was evidence establishing the fourth prong under *McDonnell Douglas*; to hold otherwise would exalt form over substance.

Maundu's contention that there was conflicting evidence as to whether eBay personnel recommended that Bhamidipati be hired is similarly unavailing. There was, in fact, some evidence that people in Mwaniki's department did not think that Bhamidipati was qualified for the position of (senior) whitebox engineer. Contrary evidence included Mwaniki's September 13 e-mail to Murray, indicating that: (a) her group liked Bhamidipati; (b) her group thought that, with his "strong technical background," he could "grow [in]to Sr. QA Whitebox"; (c) she had "very strong group opinion and I have confidence he can grow [in]to a Sr. position shortly"; and (d) she wished "to pursue this opportunity as a QA Whitebox Engineer." The fact remains that Bhamidipati indisputably *had* the requisite qualifications for a whitebox engineer, and that he *was*

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whitebox position created in late August, she was unqualified for that position. Thus, her argument would fail, since she could not establish the second *McDonnell Douglas* element of discrimination, i.e., that she "applied *and was qualified for a job* for which the employer was seeking applicants." (*McDonnell Douglas*, *supra*, 411 U.S. at p. 802, italics added; see also *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 151.)

hired for this position. The existence of certain equivocal evaluations of Bhamidipati from members of Mwaniki's group is immaterial.

Maundu (through Mwaniki's declaration in opposition to the motion) points to two eBay organizational charts showing an open position for a blackbox engineer in the Automation department as of November. The fact, however, that an internal organizational chart identifies a vacancy is not indicative by itself that the employer was actually recruiting to fill the position. The evidence submitted by eBay demonstrated that, to the contrary, the company was not seeking blackbox applicants at any time after June 12, and, specifically, there were no blackbox requisitions in November or December.

Lastly, Maundu urges that eBay engaged in a "cover-up" of Hedges's alleged discriminatory conduct, by (a) changing the original blackbox requisition to provide for a job description and qualifications of a whitebox engineer, and (b) then engaging contractors rather than employees to perform blackbox functions previously performed by Maundu. It was undisputed, however, that Murray, immediately upon being hired, decided to hire a whitebox engineer, and rejected the notion of hiring a blackbox engineer (with concomitant lesser qualifications). It was also not disputed that Murray did not know—at the time he decided to hire a whitebox engineer or when he later hired one (Bhamidipati)—of any prior blackbox requisition or that Maundu had applied for such position. Moreover, there was no evidence that Murray was aware of the prior racial comments attributed to Hedges, or, indeed, that he had ever spoken to Hedges at all about Maundu. Maundu's "cover-up" argument is simply unsupported conjecture and speculation—not evidence—that cannot form the basis of a discrimination complainant's prima facie case. (See *Burton v. Security Pacific Nat. Bank* (1988) 197 Cal.App.3d 972, 978.)

Maundu's suggestion that eBay *could have* resumed hiring for the deferred blackbox position is no substitute for evidence that it actually *did* seek or obtain

applicants for such position. (See *Chavez v. Tempe U. High School Dist. No. 213* (9th Cir. 1977) 565 F.2d 1087, 1091 ["failure to prove existence of job opening is a fatal defect in a prima facie case"]; see also *Gay v. Waiters' and Dairy Lunchmen's Union* (9th Cir. 1982) 694 F.2d 531, 547 [plaintiff does not establish prima facie case merely "upon proof that jobs, in general, were available within some unspecified time from the unspecified date at which a plaintiff applied for a position"].)[18] Likewise, we reject Maundu's unsupported *theory* that eBay "covered up" discriminatory treatment by deciding to hire a whitebox engineer and by not employing blackbox engineers.

We conclude that there was no evidence that there were any applicants for the blackbox position or that such position remained open after Maundu's rejection. Therefore, since eBay negated one of the elements of Maundu's prima facie case—i.e., the fourth prong under *McDonnell Douglas*, the trial court properly granted summary judgment in eBay's favor.

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[18] Immediately prior to oral argument, eBay's counsel sent a letter to the court, noting a recent federal court decision, *Teneyck v. Omni Shoreham Hotel* (D.C. Cir. 2004) 365 F.3d 1139 (*Teneyck*), decided May 7, 2004. In *Teneyck*, the trial court granted defendant's motion for judgment pursuant to rule 50(a) of the Federal Rules of Civil Procedure (28 U.S.C.A.), concluding that plaintiff had failed to offer sufficient evidence to establish her claim for racial discrimination. (*Teneyck, supra,* 365 F.3d at p. 1148.) Utilizing a de novo review standard (*id. at* p. 1149), the appellate court affirmed, concluding that plaintiff had failed to present a prima facie case of racial discrimination, in that she did not present evidence supporting the fourth element of *McDonnell Douglas* (*supra,* 411 U.S. at p. 802), namely, that "after [the employee's] rejection, the position remained open and the employer continued to seek applicants from persons of [the employee's] qualifications." (*Teneyck*, *supra*, 365 F.3d at p. 1152.) The court held that "[b]y not offering any evidence in support of the fourth *McDonnell Douglas* element, Teneyck failed to eliminate one of the most common legitimate nondiscriminatory reasons for a failure to hire: the absence of a vacancy. [Citation.]" (*Ibid.*) Despite the different procedural context, *Teneyck* offers significant support for our conclusion here that summary judgment was proper because Maundu failed to present a prima facie case of discrimination due to the absence of evidence of the fourth *McDonnell Douglas* element.

C. *No evidence that nondiscriminatory reason was pretextual*

eBay asserts that summary judgment was appropriate, because it offered two legitimate, nondiscriminatory reasons for not hiring Maundu, which Maundu failed to rebut with evidence of pretext. These nondiscriminatory reasons were: (1) the blackbox position for which Maundu submitted an application was unavailable because of budgetary constraints; and (2) even if one were to consider the whitebox position for which Bhamidipati was hired to have been a blackbox position, Bhamidipati clearly had greater technical background in computer programming, which training Maundu admittedly lacked. The granting of summary judgment on this basis (eBay claims) was proper, because Maundu did not present "substantial responsive evidence" that eBay's asserted nondiscriminatory reasons were pretextual. (See *Martin v. Lockheed Missiles & Space Co.*, *supra*, 29 Cal.App.4th at p. 1735.)

We conclude that Maundu could not present a prima facie case of discrimination, because of the absence of the fourth *McDonnell Douglas* prong. Therefore, we need not decide whether summary judgment was also appropriate because Maundu did not present evidence that eBay's nondiscriminatory reasons for not hiring her were pretextual. (See *Hiser v. Bell Helicopter Textron, Inc.* (2003) 111 Cal.App.4th 640, 655 [appellate courts generally "decline to decide questions not necessary to the decision"].)

DISPOSITION

The trial court properly concluded that Maundu could not establish one or more of the requisite elements of a claim for racial discrimination. Therefore, summary judgment in favor of eBay was proper, and the judgment is affirmed.

Elia, J.

WE CONCUR:

Rushing, P.J.

Premo, J.